

[Cite as *State v. Porter*, 2010-Ohio-4491.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94049

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CORVADE PORTER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506633

BEFORE: Sweeney, J., Kilbane, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: September 23, 2010

ATTORNEY FOR APPELLANT

Susan J. Moran
55 Public Square
Suite 1616
Cleveland, Ohio 44113-1901

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Michael P. Graham
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Corvade Porter (“defendant”), appeals from the sentence imposed on him at the resentencing hearing held by the trial court upon remand from this Court in *State v. Porter*, Cuyahoga App. No. 91575, 2009-Ohio-3373 (“*Porter I*”). In this appeal, defendant asserts ineffective assistance of counsel and challenges the seven-year prison sentence reimposed by the trial court. For the reasons that follow, we affirm.

{¶ 2} Defendant was convicted of two counts of felonious assault with firearm specifications and also of having a weapon while under disability. The

facts elicited at defendant's trial are set forth in *Porter I* and are incorporated here. In *Porter I*, we determined that the trial court erred by sentencing defendant on both counts of felonious assault because they were allied offenses of similar import. For that reason, this Court "vacate[d] the judgment of conviction and remand[ed] for the State to elect which charge will merge into the other for purposes of conviction and sentence, and for resentencing." *Id.* at ¶16.

{¶ 3} Upon remand, the State elected to pursue sentencing as to the first count of felonious assault. The court then heard from the State and the defendant, after which the court reimposed a seven-year prison sentence. Defendant now appeals asserting three assignments of error for our review, which will be addressed in order and together where appropriate for discussion.

{¶ 4} "1. Appellant was denied effective assistance of counsel guaranteed by Article I, Section 10 of the Ohio Constitution and the Sixth and Fourteenth Amendments to the [United States] Constitution when his attorney failed to adequately represent him at the time of sentencing."

{¶ 5} To establish his claim of ineffective assistance of counsel, defendant must show that (1) the performance of defense counsel was seriously flawed and deficient; and (2) the result of appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 6} In this case, defendant shot the victim in the face. In *Porter I*, this Court found that defendant had “created the situation giving rise to the affray by returning to confront [the victim] after [defendant] had retreated to the house.” *Porter*, 2009-Ohio-3373, ¶10. Furthermore, the victim was unarmed. *Id.*

{¶ 7} The resentencing transcript reflects that while his attorney was present in court, defendant was “present by video.” The State reminded the court that defendant’s conviction resulted from shooting someone in the face. The State indicated its belief that neither the maximum nor minimum sentence would be appropriate. Instead, the State felt that the seven-year prison sentence that the trial court had previously imposed was proper and requested the court to reimpose it. Although defense counsel had nothing further to add, defendant himself had the opportunity to address the court.

{¶ 8} The trial court stated it had considered “all the purposes and principles of the sentencing laws in the State of Ohio” and felt that a prison term was necessary and required for the firearm specifications. The court imposed a seven-year prison term, which was the same aggregate sentence defendant had previously received.

{¶ 9} There is no argument or basis from which we could conclude that defendant’s sentence would have been any different had defense counsel discussed the facts of the case or the sentencing factors on the record. Accordingly, defendant has not established the factors necessary to sustain a claim of ineffective assistance of counsel.

{¶ 10} Assignment of Error I is overruled.

{¶ 11} “II. The trial court abused its discretion in sentencing the appellant to seven years incarceration, in violation of the purposes and principles of the felony sentencing guidelines.

{¶ 12} “III. Appellant was deprived of his right to due process under the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution when the resentencing court imposed a harsher sentence upon remand.”

{¶ 13} On remand, the State elected to pursue sentencing on defendant’s conviction for felonious assault in violation of R.C. 2903.11(A)(1), a felony of the second degree, with firearm specifications. The trial court was also required to impose sentence for defendant’s conviction of having a weapon while under disability. The trial court imposed a four-year prison term for the felonious assault conviction to be served consecutively to the three-year mandatory prison term on the firearm specification, but concurrent with a one-year prison term on the conviction for having a weapon while under disability.

{¶ 14} The two-fold analysis for reviewing sentences is: first to determine whether the trial court complied with all applicable rules and statutes when imposing the sentence such that the sentence it imposed is not “clearly and convincingly contrary to law”; if so, we proceed to examine if the trial court’s sentence constitutes an abuse of its discretion. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶4.

{¶ 15} In this case, defendant’s seven-year prison sentence is not contrary to law, nor did the trial court abuse its discretion by reimposing it. The trial court was compelled to impose a three-year prison term for the firearm specifications that must be served “consecutively to and prior to the prison term imposed for the underlying offense[.]” R.C. 2929.14(D). Defendant received a four-year prison term for a second-degree felony. The potential range of prison terms for a second-degree felony is two to eight years. R.C. 2929.14(A)(2). Defendant received a concurrent one-year prison sentence for his having a weapon while under disability conviction. To the extent that defendant maintains that the trial court increased his sentencing following the remand from this Court, this contention is not supported. Although the trial court imposed different terms on each count at the resentencing hearing, in the aggregate, defendant received the exact same prison term — seven years.

{¶ 16} Accordingly, Assignments of Error II and III are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR